

April 5, 2004

The Honorable Gale Norton
Secretary, U.S. Department of Interior
1849 C St., NW
Washington, D.C. 20240

Dear Secretary Norton:

Let me begin by commending the U.S. Fish and Wildlife Service (Service) for its timely 90-day finding on the state's *Petition to Remove the Preble's Meadow Jumping Mouse from the List of Endangered and Threatened Wildlife (Petition)*. While we certainly are pleased with the 90-day result, we understand that the 9-month status review will be determinative.

As has been well documented in the press, the peer review is a central element in the status review, which leads me to the central purpose for this correspondence. In short, I have great reservations about the composition and objectivity of the peer review team assembled to evaluate the state's *Petition*. To this end, I have been advised that the peer review team was selected, at the request of the Service, by the Colorado Division of Wildlife (CDOW).

While several team members are appropriate, I ask you to review the overall composition of the team for the reasons set forth below. I understand that several team members were peer reviewers on the original listing decision, one of which who has documented his view that the mouse should remain listed. Another member co-authored a study that is directly refuted by Dr. Ramey's work. The spouse of another team member submitted a similar proposal to that of Dr. Ramey, to the Recovery Team, that was not funded. Still another wrote an unpublished report, cited in the original listing, that postulated that Krutzsch (the scientist whose work was widely relied on by the Service to support the Preble's listing) was correct and should not be questioned. As you can see, many of the peer reviewers were supportive of the science behind the original decision to list the mouse. To include these individuals on a peer review team places them in the

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difficult, and potentially embarrassing, situation where they may be forced to defend, or admit errors regarding their previous work. At a minimum, the appearance of objectivity within the peer review team has been compromised. Structured properly, this panel could be a tremendous opportunity to set a standard for objective peer review of new scientific research presented in support of listing or delisting petitions of threatened and endangered species and distinct population segments.

A reliable peer review of scientific work must depend on the competence and total objectivity of the reviewers. They must be recognized experts in the proper scientific discipline, and independent of the specific issues being studied. The majority of the peer reviewers selected for this particular task do not meet these basic requirements. Several are not geneticists, and many have significant previous exposure, financial interests and public stances regarding the very contentious issues that the science seeks to clarify.

While I support stronger state roles in Endangered Species Act issues, the CDOW has been directly involved in many mouse-related activities since its initial listing, and has been awarded direct Congressional appropriations and Service grants to perform these activities. I understand a direct FY 2000 Department of the Interior appropriation in the amount of \$400,000.00, was made to CDOW for Preble's-related work. In 2003, \$1,740,000.00, from a Land Owner Incentive Program grant, administered by the Service, was awarded to CDOW. A portion of that funding was to be used to "focus on Front Range habitat for the Preble's Meadow Jumping Mouse." (USDOI Press Release dated February 25, 2003). Most recently, a \$1,270,452.00 State Wildlife Grant, again administered by the Service, was awarded to CDOW in significant part to complete Preble's Meadow Jumping Mouse Surveys in Colorado. (USDOI Press Release dated March 10, 2004). I am concerned about what may be an appearance of conflict of interest, since a peer review conclusion in support of de-listing may reduce funding in this area.

Common sense alone would seem to indicate that the decision to allow CDOW to select the peer review team was improper. However, federal regulations lead to the same conclusion. *The Interagency Policy to Provide Criteria, Establish Procedures, and Provide Guidance to Ensure that Decisions Made under the authority of the Endangered Species Act of 1973 Represent the Best Scientific and Commercial Data Available* was adopted to ensure that the science used by the Service is "**reliable, credible** and represents the best scientific and commercial data available." 59 Fed. Reg. 34271 (July 1, 1994) (Emphasis added). In the same *Policy* guidance, agencies are directed to "gather and **impartially** evaluate biological, ecological, and other information that disputes official positions, decisions and actions proposed or taken by the Service during their implementation of the Act." (Emphasis added.) While the Service is allowed to outsource peer review selection to an outside agency, the chosen agency vicariously assumes the same responsibilities that the Service would otherwise have in selecting a review team, including those set forth above. This would, of course, apply to CDOW and any actual or implied conflicts of interest it may possess. At the very least, CDOW

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personnel that directly benefit from the listing should be fire-walled from the process to ensure objectivity.

While other agencies directly address conflicts of interest in the peer review context, the Service has not chosen to do so. For example, in the second edition of the U.S. Environmental Protection Agency *Peer Review Handbook* (EPA 100-B-00-001 December 2000), the following guidance is provided related to conflicts of interest:

Conflict of interest is a situation in which, because of other activities or relationships with other persons, an individual is unable or potentially unable to render impartial assistance or advice to the Agency, or the person's objectivity in performing the work is or might be otherwise impaired, or a person has an unfair competitive advantage. Generally, a conflict of interest arises when the person is affected by his/her private interests, when he/she or his/her associates would derive benefit from incorporation of their point of view in an Agency product, or when their professional standing and status or the significance of their principal area of work might be affected by the outcome of the peer review. Clearly, peer reviewers should not be placed in the position of reviewing their own research and analyses that form the basis of the work product under review as this might impair their objectivity.

Although the EPA *Handbook* is not directly applicable to the Service, surely these basic principles of fairness have been assumed by the agency. Assuming this to be true, CDOW and many of the peer reviewers appear to maintain clear conflicts of interest related to the state's *Petition*.

Beyond implied adoption of conflict of interest rules, the recently released *Proposed Bulletin on Peer Review and Information Quality*, while not formally adopted, points to a federal penchant for demanding an impartial and fair peer review process. The background materials for the proposed regulation indicate that “[i]ndependent, objective peer review has long been regarded as a critical element in ensuring the reliability of scientific analyses.” 68 Fed. Reg. 178 (September 15, 2003) (Emphasis added). Most pointedly, and perhaps most indicting of the decision to choose CDOW as the peer review team selecting agency, the *Bulletin* states:

It is also important to understand the relationship of the peer reviewers with the agency, including their funding history. A peer reviewer who is financially dependent on the agency, or at least hopes to profit financially from other dealings with the agency, may not always be completely independent, or appear truly independent.

The position of CDOW personnel to summarize, edit and present the peer reviewers comments puts them in the same category as the peer reviewers and obligates them to abide by the cited standards. In my view, CDOW should not have been put in the position of having to defend against

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such an insinuation. Regardless, they are now going to be forced to do so because of the appearance of impropriety.

The exact wording from the *Bulletin* provides, in my view, sound guidance for the selection of peer reviewers, not followed in the present case. The pertinent section of the *Bulletin* reads as follows:

Selection of Peer Reviewers: Peer reviewers shall be selected primarily on the basis of necessary scientific and technical expertise. When multiple disciplines are required, the selected reviewers should include as broad a range of expertise as is necessary. When selecting reviewers from the pool of qualified external experts, the agency sponsoring the review shall strive to appoint experts who, in addition to possessing the necessary scientific and technical expertise, are independent of the agency, **do not possess real or perceived conflicts of interest, and are capable of approaching the subject matter in an open-minded and unbiased manner.** Factors relevant to whether an individual satisfies these criteria include whether the individual: (i) Has any financial interests in the matter at issue; (ii) has, in recent years, advocated a position on the specific matter at issue; (iii) is currently receiving or seeking substantial funding from the agency through a contract or research grant (either directly or indirectly through another entity, such as a university); or (iv) has conducted multiple peer reviews for the same agency in recent years, or has conducted a peer review for the same agency on the same specific matter in recent years. If it is necessary to select a reviewer who is or appears to be biased in order to obtain a panel with appropriate expertise, the agency shall ensure that another reviewer with a contrary bias is appointed to balance the panel. (Emphasis added.)

CDOW personnel, and more than half of the peer reviewers selected by that agency, do not meet one or more of the factors mentioned above to ensure an “open-minded and unbiased” review of the state’s *Petition*. Thus, my great degree of concern.

In light of the information provided in this letter, I encourage you to re-evaluate the decision to allow CDOW personnel to choose the peer review team for the state’s *Petition*. I would also ask that the peer review team selected by CDOW be reconsidered. While I do not think it appropriate to give you recommendations of my own, in the face of an obvious conflict of interest, I would suggest enlisting the services of the National Academies of Science, or another reputable entity of unquestionable objectivity, to complete the task at hand.

Finally, while Dr. Ramey’s work is a central element of Wyoming’s *Petition*, I remind you that, in the selection of the peer review team, you must not ignore the other contentions made in the *Petition*. Beyond Ramey’s analysis, the state presents a scientifically sound position indicating that the mouse maintains a wide and abundant distribution in plentiful habitat, thereby putting into question the actual “threatened” nature of the species. I also call on the Service to thoughtfully and thoroughly review the “science” which was relied upon in the original listing decision. These reviewers should be qualified to

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judge the ecological threats, presented in the original listing, against the present-day state of knowledge of mouse distribution and abundance. Again, as with Dr. Ramey's genetics research, the reviewers should have no preconceived biases regarding the original listing decision.

I have the reasonable expectation that each of the important facets of the state's petition will be adequately addressed. In order to so address the central questions posed in Wyoming's *Petition*, I counsel that the peer review team, however assembled, be admonished of its task with proper direction and a clear understanding of what is expected of them, in the form of specific questions that adequately relate the issues set forth in the *Petition*.

Thank you for your time and attention to this important matter. I would greatly appreciate your prompt response as to how you intend to proceed.

Sincerely,

Dave Freudenthal
Governor

Cc: The Honorable Craig Thomas
The Honorable Mike Enzi
The Honorable Barbara Cubin
The Honorable Bill Owens
Steve Williams, Director, U.S. Fish and Wildlife Service
Ralph Morgenweck, Regional Director, U.S. Fish and Wildlife Service
Brian Kelly, Wyoming Field Supervisor, U.S. Fish and Wildlife Service
Terry Cleveland, Director, Wyoming Game and Fish Department
John Etchepare, Director, Wyoming Department of Agriculture
Russ George, Director, Colorado Department of Natural Resources